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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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ALLISON NAVAR, et al.,

Plaintiffs,

v. 18 Civ. 10476 (LGS)

WALSH CONSTRUCTION COMPANY II, LLC, et al.,

Defendants. Decision
(Via Teleconference)
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January 7, 2021
10:48 a.m.

Before:

HON. LORNA G. SCHOFIELD,

District Judge

APPEARANCES

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(Case called)

THE DEPUTY CLERK: The parties' appearances have been noted for the record.

As stated earlier, recording or rebroadcasting of this proceeding is prohibited. Violation of this prohibition may result in sanctions.

I'm also going to ask counsel to please state your name before you speak, each time you speak, as we have a court reporter present.

We're here before the Honorable Lorna G. Schofield.

THE COURT: Okay. Good morning. As you know, we're here for me to issue an oral decision on defendants' motion to strike the consent of three of the potential opt-in plaintiffs to join a collective under the federal Equal Pay Act that I conditionally certified.

Defendants seek to strike opt-in plaintiffs Jill Bramwell and Samantha Little on the grounds that they signed severance agreements purportedly releasing any and all claims against defendants. Defendants also seek to strike a third opt-in plaintiff, Carolyn Dorsett, on the grounds that she consented to join the collective after receipt of a notice that plaintiffs mailed her on August 26, 2020, which was after the plaintiff's July 23rd deadline for sending the notice.

I will explain, but not to keep you in suspense, I'll tell you my decision, which is that the motion is denied with

respect to all three opt-in plaintiffs.

So in evaluating the motion with respect to Ms. Little and Ms. Bramwell, the first issue is whether the Skanska Building and Walsh severance agreements, which contained the releases, are valid. Under New York law, releases are contracts that are enforceable when "the language of [the] release is clear and unambiguous." *Booth v. 3669 Delaware, Inc.*, 703 N.E.2d 757, 758 (1998); *accord Lee v. New Kang Suh*, Inc., No. 17 Civ. 9502, 2020 WL 5504309, at *2 (S.D.N.Y. Sept. 11, 2020). To be valid, a release must be "knowingly and voluntarily entered into" and cannot be "the product of fraud, duress or undue influence." *Skluth v. United Merchs. & Mfrs., Inc.*, 559 N.E.2d 280, 282 (1st Dep't 1990); *accord Lee*, 2020 WL 5504309, at *2. To set aside a release, a party must demonstrate that the release does not apply to the claim at issue or that there is an equitable basis to vitiate its effect. *Id.* at 107; *accord Tortomas v. Pall Corp.*, No. 18 Civ. 5098, 2020 WL 2933669, at *2 (E.D.N.Y. May 31, 2020).

If the release is otherwise enforceable, a second issue is whether the nature of the claim -- here an EPA claim under the FLSA -- bars enforcement of the release under the circumstances. Pursuant to *Cheeks v. Freeport Pancake House, Inc.*, in order to settle a FLSA claim with prejudice pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii) -- which is not the circumstance here -- parties must seek approval of the

settlement from either the Department of Labor or a federal district court. And *Cheeks* is at 796 F.3d 199, 206 (2d Cir. 2015). But judicial approval is not required for all FLSA settlements. "The holding in *Cheeks* was limited to Rule 41(a)(1)(A)(ii) dismissals with prejudice." *Yu v. Hasaki Rest. Inc.*, 944 F.3d 395, 411 (2d Cir. 2019).

District courts have held in cases like this one that private, out-of-court releases of FLSA claims may be valid where the agreement is not the result of one-sided bargaining and instead is the product of a fair bargaining process. *See, e.g., Lee*, 2020 WL 5504309, at *6; and *Gaughan v. Rubenstein*, 261 F.Supp.3d 390, 402 (S.D.N.Y. 2017). To make this determination, courts look to:

"whether the employee had legal representation, whether the employee was fully apprised of her rights under the FLSA, whether the release agreement resolved a bona fide dispute as to the employee's entitlement to wages under the FLSA, whether the employee engaged in negotiations with her employer, whether the employee had time to consider her options, and whether the employee received a substantial monetary benefit in exchange for the release of her claims."

Lee, 2020 WL 5504309, at *6; *see, e.g., Gorczyca v. NVR, Inc.*, No. 13 Civ. 6315, 2017 WL 11435971, at *3 (W.D.N.Y. July 13, 2017); and *Gaughan*, 261 F.Supp.3d at 403. Several courts have declined to determine, prior discovery, whether a

FLSA release agreement is enforceable. *See, e.g., Tortomas*, 2020 WL 2933669, at *4-5; and *Lee*, at *6.

So let me turn now to the application of that law to the plaintiffs Ms. Little and Ms. Bramwell.

The motion to strike their consent to join is denied, as I said. I'm assuming, just for purposes of this analysis, that the terms of the Skanska Building and Walsh severance agreements are clear and unambiguous. Nevertheless, it does not appear that they are the result of a fair bargaining process. Therefore, the releases do not bar these two plaintiffs from participating in the litigation.

First, as to Ms. Little, the circumstances the parties describe suggest that she had very little bargaining power. She entered into the severance agreement on the same day she received the agreement; she was not advised by counsel; she did not alter any of the terms of the agreement; she was unaware of her right to participate in this litigation and her rights under the EPA. And during the COVID-19 pandemic, Ms. Little -- who did not otherwise have a new job offer or new job -- signed a standard severance agreement that would provide her and did provide her additional compensation. So as a result, the release in the Little severance agreement under these circumstances does not warrant striking her consent to join the action.

Similarly, the circumstances under which Ms. Bramwell

entered her severance agreement do not weigh in favor of enforcing the release. Some facts suggest that the bargaining process was fair -- Ms. Bramwell is an attorney and, before signing the agreement, she had received notice of her right to join this action. But other facts tip the scale in favor of finding that her bargaining power was not sufficiently balanced with her employer. She signed a standard agreement; its language is not tailored to address specifically her EPA claims against defendants; she did not negotiate or alter the terms of the agreement; she did not have a new job or a new job offer, and she signed the agreement in order to obtain additional compensation during this pandemic, which is, as we all know, a period of financial hardship for many people. These factors are enough to find that the release in Ms. Bramwell's severance agreement was not the product of a fair bargaining process and does not warrant striking her consent to join.

So let me turn now to the third putative plaintiff, which is Ms. Dorsett. And the motion to strike her consent to join on the ground that she consented only after plaintiffs issued their late notice on August 26th of last year is denied.

Collective actions provide participating plaintiffs certain benefits, including "the advantage of lower individual costs to vindicate rights by the pooling of resources." *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989). They also provide "judicial system benefits by efficient

resolution in one proceeding of common issues of law and fact arising from the same alleged discriminatory activity." *Id.* "[A] generous reading, in favor of those whom Congress intended to benefit from the law, is [] appropriate when considering issues of time limits and deadlines." *Velasquez v. Digital Page, Inc.*, No. Civ. 11-3892, 2014 WL 6751574, at *2 (E.D.N.Y. Dec. 1, 2014).

Defendants argue that Ms. Dorsett should be precluded from participating because (1) she consented as a result of plaintiff's late notice, and (2) striking Ms. Dorsett's consent would arguably, as they say, serve as an appropriate sanction against plaintiffs for the unauthorized issuance of the late notice. These arguments I find unpersuasive. Defendants have offered no evidence that Ms. Dorsett consented in response to the August 26 notice instead of the earlier timely notice, which she was also sent. In addition, Ms. Dorsett's own actions were timely. She consented to join on September 7th of 2020, more than two weeks before the deadline to do so. And granting the motion striking Ms. Dorsett's consent is neither in the interest of judicial efficiency nor is it equitable, as it would penalize Ms. Dorsett when she's done nothing wrong.

So in conclusion, and for these reasons, I'm denying the motion to strike. The October 30, 2020, stay on discovery pertaining to these three plaintiffs is lifted.

And I'll issue a very brief written order referring to

this proceeding and the transcript in this proceeding and put it on the docket today so we have a record of my decision.

So I think that's everything we need to deal with in this case, and I think we can move on to the next case. So thank you very much, counsel, for appearing here and your patience in hearing my oral decision, and we're adjourned.

ALL COUNSEL: Thank you, your Honor.

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